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June 21, 2012

*By Facsimile & U.S. Mail*  
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Federal Election Commission  
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COUNSEL

Re: MUR 6570

Dear Mr. Jordan:

I am writing to you on behalf of the Committee to Elect an Effective Valley Congressman ("CEEVC" or the "Committee") and its Treasurer, Beverly Grossman Palmer, in response to the complaint filed against CEEVC and others by Scott Abrams, the campaign manager for Sherman for Congress. As is explained below, the Complaint is utterly without merit — filed as a media ploy by the Sherman campaign in an effort to discredit both Congressman Berman (Sherman's opponent in the June primary and November general election) and CEEVC, an independent expenditure committee that supports Congressman Berman's re-election.

The Complaint accuses CEEVC of having made a "coordinated communication" with the Berman for Congress campaign committee because CEEVC purchased advertising space on a slate mailer for the June 2012 Primary Election distributed by Voter Guide Slate Cards ("VGSC"), whose Founder and Principal — Jerry Seedborg — allegedly was retained as a political consultant for the Berman campaign earlier this year. CEEVC was not aware that Mr. Seedborg or Seedborg Campaigns had provided any services to Congressman Berman's committee, and to this day CEEVC does not know what, if any, involvement Mr. Seedborg may have had with the Berman campaign. CEEVC does know, however, that the slate mail expenditure by CEEVC that is the subject of the Complaint was not made "in cooperation, consultation, or concert with, or at the request or suggestion of, [Congressman Berman], his authorized political committees, or their agents." 2 U.S.C. § 441a(a)(7)(B)(i). Furthermore, Mr. Seedborg did not use or convey to CEEVC any "[i]nformation about the [Berman] campaign plans, projects, activities, or needs of [Congressman Berman]," much less any such information that was "material to the creation, production, or

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distribution of the [slate mailer]." 11 CFR 109.21(d)(4)(iii)(A). For this reason, the Sherman Complaint should be summarily dismissed.

***Factual Background***

CEEVC is a non-profit political organization formed under section 527 of the Internal Revenue Code and is registered as an independent-expenditure-only political committee with the Federal Election Commission ("FEC"). The specific purpose of CEEVC is to accept contributions and to make independent expenditures in support of the election of Congressman Howard Berman to the California 30th Congressional District in the 2012 election. Virtually all of the fundraising and political consulting services are being provided to the Committee on a volunteer basis by long-time supporters of Congressman Berman, including Jack Mayesh and Carl D'Agostino, who are in charge of developing and implementing the Committee's media strategy.

The principal strategy chosen by CEEVC for its print media campaign was to attempt, as early as possible in the process, to secure and to "lock up" advertising space supporting Congressman Berman's election on as many "slate mailers" as possible. Slate mailers, or slate cards, are mass mailings that support (or oppose) candidates or ballot measures in several races simultaneously; indeed, they frequently feature and recommend an entire "slate" of candidates and/or propositions that will appear on the recipient's election ballot. Some slates are prepared and distributed by political parties and other non-profit organizations with a particular political or ideological bent (e.g., pro-environment), endorsing candidates or measures which the organization believes will support their goals and objectives. In California, however, many other slate mailers are produced and distributed by for-profit commercial vendors whose criteria for inclusion are more financial than ideological, and they will sell advertising space or "slots" on their slate cards to candidates and ballot measures. The successful slate mailer vendors in California have been producing their slate cards for election after election over the course of many years, often using a catchy name (e.g., "COPS Voter Guide" or "Republican Woman's Voice") and recognizable graphics to make their slates more attractive to the voters. Many slate mail vendors have also broken down the population of recipient voters into well-defined subsets (e.g., high-propensity Latino voters) that are thought to be receptive to particular sponsoring organizations or messages conveyed in their mailers.

Consistent with this campaign strategy, representatives of CEEVC began contacting about a dozen or so slate mail organizations in late February and early March 2012 in an attempt to purchase advertising space on their slates. Among the organizations contacted was Voter Guide Slate Cards ("VGSC"), which Mr. Seedborg evidently owns and operates. CEEVC's initial contact with VGSC, however, did not even occur through Mr. Seedborg, but was with Alyssa Mitchell, a staff member in the organization. Attached hereto as Exhibit 1 is a copy of an email that Ms. Mitchell sent to Mr. D'Agostino on March 15, 2012, in response to his inquiry regarding what slate mailers VGSC was intending to distribute for the June 5, 2012, statewide primary election that

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would encompass the 30th Congressional District. As can be seen from Ms. Mitchell's email, VGSC already had established its plans to distribute three different slates for the June 5, 2012, election to selected households in the 30th Congressional District, and the selection of those households was in no way influenced or directed by CEEVC. CEEVC's only choices regarding the selection of recipients involved which of the three different slate mailers it wished to purchase advertising space on (i.e., Democratic, Republican, or Independent) and how large a universe of voters it wanted for each of the mailers. As reflected in the follow-up "Invoice" email from VGSC to CEEVC dated March 23, 2012, CEEVC elected to purchase space on all three of VGSC's mailers and opted for the most expansive universe of voters, as well, at a total cost of \$23,595. (See Exhibit 2.)

Significantly, as the Invoice also reflects, *it was solely CEEVC* — not Seedborg or VGSC — who chose the advertising message that was to appear on each of the slate mailers accompanying Congressman Berman's name. (This was the case for all of the slate mailers on which CEEVC purchased advertising space, not just for VGSC's slate mailers. Indeed, this is the accepted practice in the slate mail business: The candidate or other committee purchasing the advertising space on the slate mailer creates the "message" for that space; the slate mailer organization then distributes that message to the pre-determined universe of voters, along with the messages of all other candidates or committees who have purchased advertising space on the mailer.) Thus, after a further exchange of emails between CEEVC and VGSC dated April 19th, April 27th, and April 30th regarding disclaimer requirements and the specifications and terms of CEEVC's participation on VGSC's slate mailers (see Exhibit 3), Mr. D'Agostino on May 4, 2012, emailed Mr. Seedborg a file containing the different messages that CEEVC wanted to have printed in the advertising spaces allocated to the 30th Congressional District race on each of VGSC's slate mailers. (Exhibit 4.) *It bears repeating that Mr. Seedborg had absolutely no role in the development, creation, or selection of these messages.*

Ultimately, CEEVC purchased advertising space on ten different slate mailers, the payments for which are duly reported on the Committee's campaign filings. The process for each of these purchases was essentially the same as it was for the VGSC slates distributed by Mr. Seedborg's company: CEEVC was told how much advertising "space" they could purchase and for what price, and CEEVC was then solely responsible for the contents of the messages that appeared on those slate mailers in support of Congressman Berman. In no instance was there any coordination in that regard with Congressman Berman, his authorized campaign committee, any current or former employees of Congressman Berman's committee, or any of the slate mail vendors themselves.

### ***Legal Analysis***

The statutory prohibition against coordination is set forth in 2 U.S.C. § 441a(a)(7)(B)(i), which provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." As noted in Sherman's complaint, the Commission's "coordinated communication" regulation, found at 11 CFR 109.21, specifies that a

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payment for a communication is made for the purpose of influencing a federal election, and constitutes an in-kind contribution to the candidate or authorized committee with whom it is coordinated, if it satisfies a three-prong test: (1) the communication must be paid for by a person other than the federal candidate or authorized committee in question; (2) one or more of the "content" standards set forth in 11 CFR 109.21(c) must be met; and (3) one or more of the "conduct" standards set forth in 11 CFR 109.21(d) must be satisfied.

There is no dispute that the portion of the VGSC slate mailer endorsing Congressman Berman's election satisfies the first two prongs of 11 CFR 109.21: that advertising space on the mailer was paid for by CEEVC; and the slate mailer is a public communication that expressly advocates the election of a candidate for federal office. See 11 CFR 109.21(a)(1) & (c)(3). But the "conduct" prong is not satisfied here. There is no suggestion in Sherman's complaint (and no facts to support any such suggestion) that the slate mailer was created or distributed at the "request or suggestion" of Congressman Berman or his campaign committee, 11 CFR 109.21(d)(1), nor that Congressman Berman or his committee were "materially involved" in its creation or distribution, 11 CFR 109.21(d)(2). There is likewise no allegation that there were "substantial discussions" between the Berman campaign and CEEVC or any of their respective agents regarding the communication. 11 CFR 109.21(d)(3). And Sherman's complaint acknowledges that the communication was not paid for by Mr. Seedborg or by any other former employee or independent contractor of the Berman campaign, so the "former employee" conduct prong is not at issue, either. 11 CFR 109.21(d)(5).

Rather, the Sherman complaint contends that the VGSC slate mailer violates 11 CFR 109.21(d)(4) because Mr. Seedborg is a "common vendor" who, during the 120 days prior to contracting with CEEVC to create, produce, or distribute the slate mailer in question, had consulted or otherwise provided political or media advice to Congressman Berman's campaign. See 11 CFR 109.21(d)(4)(i) & (ii)(I). There is another statement in 11 CFR 109.21(d)(4) that must be "true," however, in order for a "coordinated communication" to have occurred pursuant to that subdivision. The common vendor must have "*use[d] or convey[ed] to the person paying for the communication:*

*"(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or*

*"(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication."* 11 CFR 109.21(d)(4)(iii) [emphasis added].

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The Sherman complaint provides no evidence — and no reason to believe — that Mr. Seedborg (even if he were in possession of any such information in the first place) ever used or conveyed to CEEVC *any information* about Congressman Berman's campaign plans or needs, much less that the information was *material* to the creation, production, or distribution of VGSC's slate mailer. To the contrary, as set forth above, the documentary evidence conclusively establishes that *Mr. Seedborg conveyed no substantive information whatsoever to CEEVC and played no role at all* in creating the content of the portion of VGSC's slate mailers advocating the election of Congressman Berman. Moreover, as can be seen from the simple and straightforward content of the messages chosen by CEEVC for inclusion in VGSC's slate mailers, the communications themselves do not reflect the incorporation of any non-public information regarding Congressman Berman's campaign plans, activities, or needs: Urging Latino Democrats to vote for Congressman Berman because he is endorsed by the region's most prominent Latino officeholders hardly suggests the sharing of "inside" campaign plans and strategies.

Lacking any evidence to support even an allegation that Mr. Seedborg actually "use[d] or convey[ed] . . . information about the candidate's campaign plans, projects, activities, or needs" to CEEVC or that he "use[d] or convey[ed] . . . information used previously by the commercial vendor in providing services to the candidate," the Sherman complaint instead asks the Commission to *presume* that such coordination occurred in this case simply as a result of Mr. Seedborg's asserted role as a "common vendor" to the Berman campaign and to CEEVC. *See* Sherman Complaint, p. 7 ("While a consultant for Berman for Congress, Mr. Seedborg undoubtedly has been exposed to and has strategized about 'campaign plans, projects, activities, or needs.'") Yet in the rulemaking proceeding adopting the "coordination" regulation, the Commission *expressly rejected* a proposal "that the Commission should presume that the conduct standard is satisfied whenever a candidate and an outside spender use the same common vendor." 68 Fed. Reg. 421, 435. Instead, the Commission explained:

"[The Commission] disagrees with those commenters who contended the proposed standard created any 'prohibition' on the use of common vendors, and likewise *disagrees with the commenters who suggested it established a presumption of coordination*. . . . [U]nder this final rule, *even those vendors who provide one or more of the specified services are not in any way prohibited from providing services to both candidates or political party committees and third-party spenders*. This regulation focuses on the sharing of information about plans, projects, activities, or needs of a candidate or political party through a common vendor to the spender who pays for a communication that could not then be considered to be made 'totally independently' from the candidate or political party committee.

"The only commenter who identified himself as providing vendor services indicated that it is not the common practice for vendors to make use of one client's media plans in executing the instructions of a different client, and sharing 'any client

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information given by another' would 'compromise the professional relationship' that is at the 'core of any service business.' That commenter observed that '[c]ommon vendors, at whatever tier, who avoid such conduct should never be at risk of being deemed an instrument of coordination.' No other commenters offered conflicting information on these points. Thus, *because the Commission addresses only the use or conveyance of information material to the communication*, the final rules narrowly target the coordination activity without unduly intruding into existing business practices."

68 Fed. Reg. 421, 436 (emphasis added), *available at* 2003 WL 19845, pp. 25-27; accord, 68 Fed. Reg. 421, 437 ("The final rule does not require the use of any confidentiality agreement or ethical screen because *it does not presume coordination from the mere presence of a common vendor.*") (emphasis added).

#### **Conclusion**

For the reasons set forth above, the Sherman Complaint designated as MUR 6570 is factually and legally without merit. On behalf of Respondents CEEVC and its Treasurer, Beverly Grossman Palmer, we request that the complaint be summarily dismissed.

Sincerely,



Fredric D. Woosher

Enclosures

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Washington, DC 20463

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OFFICE OF GENERAL  
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STATEMENT OF DESIGNATION OF COUNSEL  
Please use *one* form for each Respondent/Entity/Treasurer  
FAX (202) 219-3923

MUR # 6570

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The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

5/25/12

Date

Respondent/Agent -Signature

Treasurer

Title (Treasurer/Candidate/Owner)

NAMED RESPONDENT: Committee to Elect an Effective Valley Congressman

MAILING ADDRESS: 10940 Wilshire Boulevard, Suite 2000

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Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation

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